(7) (4)

FILED
DEC 18 1998
OFFICE OF THE CLERK

Nos. 98-652, 98-653

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

SBC COMMUNICATIONS, INC., *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

BELL ATLANTIC CORPORATION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For the Fifth Circuit

BRIEF IN OPPOSITION OF MCI TELECOMMUNICATIONS CORPORATION, AT&T CORP., ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES, COMPETITIVE TELECOMMUNICATIONS ASSOCIATION, NATIONAL CABLE TELEVISION ASSOCIATION, SPRINT COMMUNICATIONS COMPANY, L. P., AND TELECOMMUNICATIONS RESELLERS ASSOCIATION

Thomas F. O'Neil III
William Single, IV
MCI WORLDCOM, Inc.
1133 19th Street, N.W.
Washington, D.C. 20036
(202) 736-6096

Donald B. Verrilli, Jr.*
Ian Heath Gershengorn
Michelle B. Goodman
JENNER & BLOCK
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

(Additional Counsel Listed on Inside Cover)

December 18, 1998

*Counsel of Record

47 pp

David W. Carpenter
Peter D. Keisler
SIDLFY & AUSTIN
One First National Plaza
Chicago, IL 60603
(312) 853-7237

Counsel for AT&T Corp.

Mark C. Rosenblum
Marc E. Manly
Roy E. Hoffinger
AT&T CORP.
295 N. Maple Avenue
Basking Ridge, NJ 07920
(908) 221-3539

Counsel for AT&T Corp.

Charles C. Hunter
Catherine M. Hannan
HUNTER COMMUNICATIONS LAW GROUP, P.C.
1620 I Street, N.W.
Suite 701
Washington, D.C. 20006
(202) 293-2500

Counsel for Telecommunications Resellers Association

Emily Williams
888 17th Street, N.W.
Suite 900
Washington, D.C. 20006
(202) 969-2587

Counsel for Association for Local Telecommunications Services

David P. Murray, Esq.
WILLKIE FARR & GALLAGHER
1155 21st Street, N.W., #600
Washington, D.C. 20036
(202) 328-8000

Counsel for Sprint Communications Company L.P.

Daniel L. Brenner
Neal M. Goldberg
David L. Nicoll
1724 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 775-3664

Counsel for National Cable Television Association

Danny E. Adams
Steven A. Augustino
KELLEY DRYE &
WARREN
1200 19th Street, N.W., #500
Washington, D.C. 20036
(202) 955-9600

Counsel for Competitive Telecommunications Association

Genevieve Morelli
Exec. Vice President/
General Counsel
COMPETITIVE TELE-
COMMUNICATIONS
ASSOCIATION
1900 M Street, N.W., #800
Washington, D.C. 20036
(202) 296-6650

Counsel for Competitive Telecommunications Association

QUESTIONS PRESENTED

1. Whether §§ 271-275 of the Telecommunications Act of 1996 -- which substantially reduce the restrictions imposed on the Bell Operating Companies by a 1982 judicial consent decree -- constitute legislative punishment in violation of the Bill of Attainder Clause, U.S. Const. Art. I, § 9, because they apply to those companies by name?

2. Whether §§ 271-275 violate the constitutional requirement of separation of powers or the guarantee of equal protection merely because they apply to named companies governed by a consent decree?

LIST OF PARTIES AND AFFILIATES

The parties to the proceedings in the Fifth Circuit are listed at SBC Pet. ii.

Pursuant to Supreme Court Rule 29.6, respondents state as follows:

MCI Telecommunications Corporation is a wholly owned subsidiary of MCI Communications, Inc., and MCI Communications, Inc. is a wholly owned subsidiary of MCI WORLDCOM, Inc.

MCI Telecommunications Corporation Inc. has the following nonwholly owned subsidiaries:

Integradors de Servicios S.A. de C.V.
Integradors de Servicios Central, S.A. de C.V.
News T Investments, Inc.
News Triangle Finances, Inc.
Pittsburgh Fiber
The Source2 Group, L.L.C.

AT&T Corp. has an equity or debt interest in the following publicly traded companies: AT&T Credit Holdings, Inc.; American Mobile Satellite Corporation; Lanser Wireless Inc. (Canada); and Teleport Communications Group Inc.

Sprint Communications Company L.P. ("Sprint") is a limited partnership organized for the purpose of engaging in telecommunications and related businesses, and is wholly owned by subsidiaries, which are wholly owned by Sprint Corporation, a publicly traded corporation. Sprint Communications Company L.P. has the following non-wholly

owned subsidiaries: Asian American Communications, L.L.C., Call-Net Enterprises, Inc., and United Telephone company of Kansas. The following affiliates of Sprint have issued shares and/or debt securities to the public: Carolina Telephone and Telegraph Company, Centel Corporation, Centel Capital Corporation, Central Telephone Company, Sprint-Florida, Inc., United Telephone Company of Ohio, The United Telephone Company of Pennsylvania, Sprint Capital Corporation, Sprint Spectrum L.P., and Sprint Spectrum Finance Corporation.

The Association for Local Telecommunications Services ("ALTS") is a not-for-profit trade association comprised of companies that construct and operate local telecommunications networks in competition with incumbent local exchange carriers. ALTS does not have a parent company, affiliate, or non-wholly-owned subsidiaries. ALTS has not issued shares or debt securities to the public.

Competitive Telecommunications Association ("CompTel") is the principal national industry association representing competitive telecommunications carriers and their suppliers, with over 200 members nationwide. CompTel has not issued shares or debt securities to the public. CompTel does not have any parent companies, subsidiaries or affiliates that have issued shares or debt securities to the public.

The National Cable Television Association, Inc. is the principal trade association of the cable television industry in the United States, representing the interests of owners and operators of cable television systems serving over 80 percent of the nation's cable households. Its members also include cable programmers, cable equipment manufacturers and others interested in or affiliated with the cable television industry. NCTA has no parent companies, subsidiaries or affiliates whose listing is required by Rule 29.6.

The Telecommunications Resellers Association ("TRA") is a national trade association representing more than 775 entities engaged in, or providing products and services in support of, telecommunications resale. TRA was created and carries a continuing mandate, to foster and promote telecommunications resale, to support the telecommunications resale industry and to protect and further the interests of entities engaged in the resale of telecommunications services. TRA's resale carrier members resell both interexchange and local exchange services. TRA has not issued stock or debt securities to the public. TRA does not have any parent companies, subsidiaries or affiliates which have issued stock or debt securities to the public.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES AND AFFILIATES ii

TABLE OF AUTHORITIES vii

STATEMENT OF THE CASE 1

A. Background 4

B. Proceedings Below 14

REASONS TO DENY THE PETITIONS 15

I. THIS CASE DOES NOT PRESENT THE QUESTION IDENTIFIED IN SBC'S PETITION 16

II. THE FIFTH CIRCUIT CORRECTLY APPLIED SETTLED ATTAINDER CLAUSE LAW IN HOLDING THAT SECTIONS 271-275 IMPOSED NO "PUNISHMENT" ON PETITIONERS 19

III. THE FIFTH CIRCUIT'S DECISION DOES NOT PRESENT ANY SEPARATION OF POWERS OR EQUAL PROTECTION QUESTION WARRANTING REVIEW 25

IV. PRACTICAL EXIGENCIES DO NOT WARRANT A GRANT OF CERTIORARI IN THIS CASE 29

CONCLUSION 30

TABLE OF AUTHORITIES

CASES **Page**

Apache Bend Apartments, Ltd. v. United States, 964 F.2d 1556 (5th Cir. 1992), *superseded on standing grounds*, 987 F.2d 1174 (1993) . 28
Atonio v. Wards Cove Packing Co., 10 F.3d 1485 (9th Cir. 1993) 28, 29
BellSouth Corp. v. FCC, 144 F.3d 58 (D.C. Cir. 1998) 15, 19, 23, 30
Benjamin v. Jacobson, 124 F.3d 162 (2d Cir. 1997) 27
Board of Governors of Federal Reserve System v. Agnew, 329 U.S. 441 (1947) 19
Brookpark Entertainment Inc. v. Taft, 951 F.2d 710 (6th Cir. 1991) 23
Central States, Southeast & Southwest Areas Pension Fund v. Lady Baltimore Foods, Inc., 960 F.2d 1339 (7th Cir. 1992) 28
City of New Orleans v. Dukes, 427 U.S. 297 (1976) 28
Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1866) 21, 22
De Veau v. Braisted, 363 U.S. 144 (1960) 22
Dehainaut v. Pena, 32 F.3d 1066 (7th Cir. 1994) 23
Dent v. West Virginia, 129 U.S. 114 (1889) 21
Dougan v. Singletary, 129 F.3d 1424 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 2375 (1998) . . 26
FCC v. Beach Communications, Inc., 508 U.S. 307 (1993) 27
FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775 (1978) 19
Flemming v. Nestor, 363 U.S. 603 (1960) 22

TABLE OF AUTHORITIES -- Continued

Page

Fresno Rifle and Pistol Club, Inc. v. Van de Kamp, 965 F.2d 723 (9th Cir. 1992) 23
Ex parte Garland, 71 U.S. (4 Wall.) 333 (1866) . 22
Gavin v. Branstad, 122 F.3d 1081 (8th Cir. 1997) 27
Hawker v. New York, 170 U.S. 189 (1898) 21
Inmates of Suffolk County Jail v. Rouse, 129 F.3d 649 (1st Cir. 1997), *cert. denied*, 118 S. Ct. 2366 (1998) 27
Maine Central Railroad Co. v. Brotherhood of Maintenance of Way Employees, 813 F.2d 484 (1st Cir. 1987) 28
McMullen v. United States, 989 F.2d 603 (2d Cir. 1993) 23
Nixon v. Administrator of General Services, 433 U.S. 425 (1997) . . . . . *passim*
Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421 (1855) 3, 26
Pierce v. Carskadon, 83 U.S. (16 Wall.) 234 (1872) 22
Plaut v. Spendthrift Farms, Inc., 514 U.S. 211 (1995) 20, 24, 26, 28
Plyler v. Moore, 100 F.3d 365 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 2460 (1997) 27
Robertson v. Seattle Audubon Society, 503 U.S. 429 (1992) 26
Selective Services System v. Minnesota Public Interest Research Group, 468 U.S. 841 (1984) 2, 20, 24

TABLE OF AUTHORITIES -- Continued

Page

United States v. American Telephone & Telegraph Co., 552 F. Supp. 131 (D.D.C. 1982), *aff'd mem. sub nom Maryland v. United States*, 460 U.S. 1001 (1983) 5
United States v. Brown, 381 U.S. 437 (1965) 22, 25
United States v. GTE Corp., 603 F. Supp. 730 (D.D.C. 1984) 28
United States v. Lovett, 328 U.S. 303 (1946) 22
United States v. Western Electric Co., 552 F. Supp. 131 (D.D.C. 1982), *aff'd* 460 U.S. 1001 (1983) 5, 6
United States v. Western Electric Co., 592 F. Supp. 846 (D.D.C. 1984) 6
United States v. Western Electric Co., 673 F. Supp. 525 (D.D.C. 1987), *aff'd in part and rev'd in part*, 900 F.2d 283 (D.C. Cir. 1990) . . . . *passim*
United States v. Western Electric Co., 894 F.2d 1387 (D.C. Cir. 1990) 7
United States v. Western Electric Co., 900 F.2d 283 (D.C. Cir. 1990) 6
United States v. Western Electric Co., 907 F.2d 160 (D.C. Cir. 1990) 7
United States v. Western Electric Co., 969 F.2d 1231 (D.C. Cir. 1992) 7
United States v. Western Electric Co., 993 F.2d 1572 (D.C. Cir. 1993) 6
United States v. Western Electric Co., 12 F.3d 225 (D.C. Cir. 1993) 7
United States v. Western Electric Co., 890 F. Supp. 1 (D.D.C. 1995) 6, 10

Page

United States v. Western Electric Co., No. 82-0192 (HHG), 1996 WL 255904 (D.D.C. Apr. 11, 1996) 13
WMX Technologies, Inc. v. Gasconade County, 105 F.3d 1195 (8th Cir. 1997) 23

STATUTES & CONSTITUTION

47 U.S.C. § 153(4)(B) 17
47 U.S.C. § 271(a) 17
47 U.S.C. § 271(b)(3) 10
47 U.S.C. § 271(c)(1) 11
47 U.S.C. § 271(d)(3) 11
47 U.S.C. § 271(g)(3) 10
47 U.S.C. § 271(g)(4) 10
47 U.S.C. § 271(g)(5) 10
47 U.S.C. § 271(g)(6) 10
47 U.S.C. § 273(b) 11
47 U.S.C. § 274(a) 12
Bill of Attainder Clause, U.S. Const. Art. I, § 9 ..... *passim*

LEGISLATIVE MATERIAL

Competitive Status of the Bell Operating Companies: Hearings on H.R. 3687 and H.R.3800, Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce, 99th Cong. (Mar. 13, 1986) 8, 27

TABLE OF AUTHORITIES -- Continued

Page

Telecommunications Policy Act (Part I):Hearings Before the Subcomm. of Telecommunications and Finance of the House Comm. on Energy and Commerce, 101st Cong. (Mar. 7 and Apr. 18, 1990) 9
Telecommunications: The Role of the Department of Justice, Hearing Before the House Committee on the Judiciary, 104th Cong. (May 9, 1995) 27
Communications Law Reform: Hearings Before the Subcomm. on Telecommunications and Finance of the House Comm. on Commerce, 104th Cong. (May 10, 1995) 8
142 Cong. Rec. (daily ed. Jan. 26, 1996) 12
H.R. Conf. Rep. No. 104-458 (1996) 9
S. Rep. No. 104-230 (1995) 9

ADMINISTRATIVE RULINGS

In re Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorization for Southern New England Telecommunications Corp., Transferor to SBC Communications, Inc. Transferee, CC Docket No. 98-25, FCC 98-276 (rel. Oct. 23, 1998) 18
In re Application of Ameritech Michigan, Memorandum Opinion and Order, 9 Communication Reg. (P&F) 267 (1997) 11

TABLE OF AUTHORITIES -- Continued

Page

MISCELLANEOUS

Chairman Edward Whitacre, Jr., Investor Briefing, Mar. 23, 1996 13

Common Carrier Bureau, FCC Report on Local Competition (Dec. 5, 1998) 10

Competitive Impact Statement, *United States v. Western Electric Co.*, 47 Fed. Reg. 7170 (1982) 5

Memorandum of the Bell Companies in Support of Their Motion for a Waiver of the Interexchange Restriction to Permit Them to Provide Information Services Across LATA Boundaries, United States v. Western Elec. Co., No. 82-0192 (D.D.C.) (filed June 25, 1993) 12

NYNEX News Release, Feb. 1, 1996 13

PacTel News Release, Feb. 8, 1996 13

PR Newswire, Feb. 8, 1996 13

SBC Communications Inc, Investor Information Statement of Edward Whitacre, Jr., Feb. 20, 1996 13

Laurence H. Tribe, American Constitutional Law (2d ed. 1988) 25

STATEMENT OF THE CASE

In this case, the U.S. Court of Appeals for the Fifth Circuit correctly held that §§ 271-275 of the Communications Act, 47 U.S.C. §§ 271-275, do not violate the Bill of Attainder Clause, U.S. Const., Art. I, § 9, Cl. 3. The Clause prohibits Congress from imposing legislative punishment on specific persons or classes of persons. Sections 271-275, added by the Telecommunications Act of 1996 (the "1996 Act"), do apply to the Bell Operating Companies ("BOCs") by name. But this legislation cannot be an attainder because it does not punish the BOCs. To the contrary, the 1996 Act leaves the BOCs undeniably better off than they were before it was enacted. Unlike all other local telephone companies, the BOCs were previously subject to an antitrust consent decree that prohibited each BOC from providing long distance service anywhere in the country, and from manufacturing telecommunications equipment, until widespread competitive alternatives to the BOC's local monopolies had emerged. The 1996 Act *eliminated* the decree's restrictions on the BOCs' right to provide long distance service in most areas of the country. It also eased the substantive standards and streamlined the procedures applicable to BOC efforts to remove the remaining restrictions. That is doubtless why the BOCs lobbied hard for the very provisions they now attack, lauded Congress for enacting them, and apparently did not discern their "punitive" character until some 18 months after the Act's passage.

Even putting all that aside, review is unwarranted because the Fifth Circuit's decision does not conflict with any decision of this Court or any court of appeals. In holding that §§ 271-275 "are not punishment because they serve [the] nonpunitive purpose [of] attempting to ensure fair competition," (SBC Pet. App. 32a), the Fifth Circuit did not "subver[t]" the Attainder Clause. *See* SBC Pet. 4. The so-called "prophylactic exception" that petitioners attack is merely the "moniker" (SBC Pet. App. 19a n.20) the Fifth Circuit supplied for the

well-settled principle courts have uniformly applied for the past 150 years, namely that no law is invalidated as an attainder when "the statute, 'viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes.'" *Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841, 852 (1984) (citation omitted).

It is petitioners who are proposing revolutionary changes in the law. They are advancing the startling claims that a line-of-business restriction on a corporation is equivalent to an occupational restriction on an individual, and that an occupational restriction on an individual is, in turn, equivalent to a disability such as a death sentence or term of imprisonment (whose "type and severity" are such that they are always punitive). But that is not, and has never been, the law. To the contrary, courts faced with Attainder Clause challenges to occupational restrictions have always conducted a searching inquiry into whether the challenged law advanced legitimate nonpunitive economic or regulatory purposes, or whether the law instead aimed to punish the persons to whom it applied. They have done so because restrictions of that nature normally are imposed by legislatures for entirely proper regulatory purposes having nothing to do with punishment. This settled law reflects the common sense notion that occupational restrictions are fundamentally different from a death sentence or incarceration, which are always punitive in character.

Thus, the Fifth Circuit did not suggest (much less hold) that even an inherently punitive sanction such as imprisonment could be saved so long as some prophylactic purpose for the sanction could be hypothesized. All the Fifth Circuit did was acknowledge that for restrictions that are *not* inherently punitive in character, the dispositive inquiry is whether the

restriction was a legitimate regulation of conduct or instead an effort to punish.

Nor does it matter that §§ 271-275 apply only to the monopoly assets controlled by the BOCs, and not to the 1,300 local exchange carriers with monopolies serving the remaining 20% of the country. If a line-of-business restriction constituted punishment (as the case would be with a legislative sentence of incarceration), it would be an attainder even if it applied to a class comprising all local carriers. In all events, however, when a list of names is simply a shorthand means of describing persons or assets that comprise a distinct class, as it is here, it is not somehow transformed into legislative punishment. Thus, SBC's attainder argument is merely a thinly-disguised equal protection challenge to the fact that the BOCs are subject to different regulations than other local carriers. That is presumably why Bell Atlantic has filed a separate petition raising such a claim directly. But because §§ 271-275 advance competitive policies of profound importance, and because there are substantial and well-recognized differences between the BOCs and all other local carriers that justify differences in treatment, these provisions raise no substantial equal protection issue.[1]

---

[1]The separation of powers challenge raised in Bell Atlantic's petition is as meritless as the others, for this Court has repeatedly held that private bills, and other legislation that applies only to named parties by prospectively modifying judicial decrees, do not violate separation of powers. *See Pennsylvania* v. *Wheeling and Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855).

A. Background.

1. The 20 BOCs exercise monopoly control over local telephone service in regions comprising more than 80% of America's homes and businesses. Originally, the BOCs were part of the integrated Bell System, and were affiliated with AT&T, which then monopolized the potentially competitive long distance market, and Western Electric, which monopolized the potentially competitive business of manufacturing telecommunications equipment.

The Bell System's dominance rested on the BOCs' control of local networks, which no other firm could afford to duplicate. Each local network consisted of lines and switches that connected all homes and businesses in a BOC's local service area. That network was used to provide local service, but it was also indispensable to long distance service. A long distance call initiated by a customer first traveled on the BOC's local network from the customer's premises to a point where it was handed off to AT&T's long distance facilities, which then transported the call to the recipient's local network for completion. Without access to the local network, no long distance carrier could provide service. BOC cooperation was therefore essential if companies such as MCI were to provide competitive long distance service.

2. The BOCs were divested from AT&T as a result of a 1982 antitrust consent decree (the Modification of Final Judgment or "MFJ"). The MFJ settled an eight-year-old government antitrust suit brought to address the anticompetitive effects of a single enterprise's ownership of both the "bottleneck" local exchange facilities and competitive long distance and manufacturing businesses. The MFJ's restrictions prohibited the BOCs from entering the markets for long distance telephone services, equipment manufacturing,

information services (which included electronic publishing and alarm monitoring), and any nonregulated services.[2]

In a proceeding to determine whether the proposed decree was in the public interest, both the United States and AT&T stated that the MFJ did *not* represent a determination that the BOCs had violated the antitrust laws. To the contrary, the MFJ reflected the judgment (based on substantial evidence) that the mere integration of local monopoly and long distance facilities inherently operated as an entry barrier -- whether or not an antitrust violation could ever be proven. The engineering and operation of local networks were so complex and dynamic that after-the-fact antitrust remedies for illicit favoritism toward affiliates in competitive markets could never prevent abuses of local monopolies. Moreover, allowing an integrated competitor to compete in markets dependent on access to the local network would inevitably generate huge monitoring and litigation costs. The MFJ thus did something "far more important" than determining antitrust liability; it established an industry "structure" in which separate ownership of local network monopoly facilities would allow "more certain" development of competition in the long distance and manufacturing markets by eliminating any BOC incentive to use the essential local exchange facilities in an anticompetitive manner. Competitive Impact Statement, *United States v. Western Elec. Co.*, 47 Fed. Reg. 7170, 7172 (1982). Because the MFJ's "line of business" restrictions were designed for this purpose, they were to be removed only "upon a showing by the petitioning BOC that there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter." MFJ Section VIII(C); *United States*

---

[2] *United States v. American Tel. &Tel. Co.*, 552 F. Supp. 131, 227-28, 231, 232-34 (D.D.C. 1982), *aff'd mem. sub nom. Maryland v. United States*, 460 U.S. 1003 (1983).

v. Western Elec. Co., 552 F. Supp. 131, 194-95, 231, (D.D.C. 1982), *aff'd*, 460 U.S. 1001 (1983) (removal of the restrictions may come about only "as a result of technological developments which eliminate the . . . local exchange monopoly or from changes in the structures of the competitive markets"); *United States v. Western Elec. Co.*, 673 F. Supp. 525, 533 (D.D.C. 1987), *aff'd in part and rev'd in part on other grounds*, 900 F.2d 283 (D.C. Cir. 1990).

3. The administration of the MFJ fell to a single district judge who established a multi-stage procedure, unconstrained by deadlines, for deciding BOC requests to remove or modify the MFJ's restrictions. *See United States v. Western Elec. Co.*, Inc., 592 F. Supp. 846, 873 & nn.112-14 (D.D.C. 1984). "Almost before the ink was dry on the decree, the [BOCs] began to seek the removal of its restrictions." *United States v. Western Elec. Co.*, 673 F. Supp. at 601. The district court waived the restrictions for a number of peripheral activities where BOC control of the local network posed no threat, and eventually removed the constraints on information services and non-telecommunications businesses.[3] But it rejected all significant BOC requests to remove or narrow the core long distance and manufacturing restrictions. For example, in 1987 and again in 1991, the MFJ court rejected requests for authority to provide long distance services to customers of their cellular, paging, and other mobile radio services, all of which faced some competition. *See United States v. Western Elec. Co.*, 673 F. Supp. at 551-52 (denying waiver); *United States v. Western Elec. Co.*, 890 F. Supp. 1, 6-8 (D.D.C. 1995) (granting waiver

---

[3]*See United States v. Western Elec. Co.*, 900 F.2d 283, 305-10 (D.C. Cir. 1990) (affirming removal of general restriction and portion of information services restriction); *United States v. Western Elec. Co.*, 993 F.2d 1572, 1582 (D.C. Cir. 1993) (affirming removal of remaining information services restriction).

only on restrictive conditions the BOCs could not subsequently meet). The MFJ court refused to allow the BOCs to provide long-distance services to centralized gateways that provide information services, *United States v. Western Elec. Co.*, 907 F.2d 160, 163 (D.C. Cir. 1990), or to provide long-distance signaling services. *United States v. Western Elec. Co.*, 969 F.2d 1231, 1241-43 (D.C. Cir. 1992). The MFJ court even denied a BOC request to provide long distance services originating *outside* the States where they had local bottleneck monopolies. *See United States v. Western Elec. Co.*, 673 F. Supp. at 543-45. BOC efforts to narrow the scope of the manufacturing restrictions met a similar fate. *See United States v. Western Elec. Co.*, 894 F.2d 1387 (D.C. Cir. 1990) (affirming rejection of BOC request for authority to engage in design and development of equipment); *United States v. Western Elec. Co.*, 12 F.3d 225 (D.C. Cir. 1993) (affirming rejection of BOC request for authority to finance development of equipment by independent companies in exchange for royalties).

The MFJ court also rejected the argument that the BOCs should automatically be allowed to provide long distance service in any State that had removed legal barriers to local competition. As the court explained, that argument "proceeds on the basis of the erroneous assumption that repeal of local regulation will open the local exchange monopolies to competition." *United States v. Western Elec. Co.*, 673 F. Supp. 525, 544 (D.D.C. 1987), *aff'd on this ground*, 900 F.2d 283 (D.C. Cir. 1990). The court held that because the local exchange had historically been a natural monopoly, the long-distance restriction could be removed only on a showing that for "technological or economic, as well as legal reasons, competition in local exchange markets is feasible *and has, in fact, emerged on a substantial scale*." 673 F. Supp. at 545 (emphasis added). Although the MFJ court held open the

possibility that "effective regulation" might justify removal, *id.* at 536 n.43, the court left no doubt that mere resale of BOC local services would not suffice, and that substantial, widespread facilities-based local competition was a prerequisite to removing the MFJ's core restrictions. *Id.* at 545 ("[O]nly when a practical and economically-sound method is found for large-scale bypass or for connecting local consumers by a different method -- as microwaves and satellites were ultimately found to be feasible for handling long distance traffic -- can the Regional Companies' local monopoly be regarded as eroded.").

4. Unable to secure their objectives through the judicial process, the BOCs petitioned Congress for what amounted to private legislation. As early as 1986 the BOCs urged adoption of legislation (H.R. 3800) that would have transferred to the FCC the responsibility for deciding whether the BOCs could enter markets prohibited by the MFJ.[4] In the 103d Congress, the BOCs supported legislation (H.R. 3626) -- again applying only to them -- that contained a framework for removing the long distance and manufacturing restrictions. In the 104th Congress, BOC representatives again testified in favor of a BOC-specific approach to reforming the MFJ.[5]

---

[4] *See Competitive Status of the Bell Operating Companies: Hearings on H.R. 3687 and H.R. 3800, Before the Subcomm. on Telecommunications, Consumer Protection and Finance of the House Comm. on Energy and Commerce*, 99th Cong. 586-87 (Mar. 1986) (testimony of Robert A. Dickemper, Southwestern Bell Corp.). The FCC had consistently opposed the MFJ's line of business restrictions.

[5] *E.g., Communications Law Reform: Hearings Before the Subcomm. on Telecommunications and Finance of the House Comm. on Commerce*, 104th Cong. 140 (May 10, 1995) (Testimony of Richard H. Brown, Vice Chairman, Ameritech).

At no time did the BOCs raise constitutional objections to legislation that would modify the MFJ's long distance and manufacturing restrictions and transfer authority for their administration to the FCC. To the contrary, Professor Tribe testified (for the BOCs) that:

> Congress has authority to lift [the MFJ] restrictions in whole or in part, replacing them with equivalent or less restrictive regulatory alternatives that *single out* the parties to the AT&T litigation, as an exercise of its authority under the Necessary and Proper Clause, Art. I, section 8, cl. 18, to "carr[y] into Execution" the powers of the Article III judiciary. Because such parties have already been *singled out* through enforcement activity of the executive branch, in litigation supervised by the judicial branch, Congress may likewise address its legislative substitute for the MFJ to those parties in particular . . . provided that it avoids imposing more burdensome restrictions, or restrictions that violate the First Amendment.[6]

5. In the 1996 Act, the BOCs finally obtained legislative relief. Congress accepted the BOCs' longstanding argument that the industry should not be governed by a consent decree administered by "a single unelected federal judge," *see* S. Rep. No. 104-230 at 5, 9 (1995), and fashioned a new legislative framework designed to open all telecommunications markets to competition. H.R. Conf. Rep. No. 104-458 at 1 (1996). Thus, in § 601, Congress provided that the BOCs would cease

---

[6]Telecommunications Policy Act (Part 1): *Hearings Before the Subcomm. of Telecommunications and Finance of the House Comm. on Energy and Commerce*, 101st Cong. 416 (Mar. 7 and Apr. 18, 1990) (emphasis added). Professor Tribe raised constitutional concerns only about legislative reimposition of restrictions that had previously been removed by the MFJ court. *See id.*

to be subject to the "restrictions and obligations" of the MFJ and would instead be subject to the "restrictions and obligations" of the Act. *See* SBC Pet. App. 142a-44a (setting forth provision). Congress also enacted §§ 251-253, which are designed to begin the process of opening local markets to competition. Those provisions do not, as the BOCs assert here, eliminate the "last vestige" of the local bottleneck. SBC Pet. 7. Section 253 simply removes state legal barriers to competitive entry, a condition the MFJ court made clear was not sufficient to justify lifting the long distance restriction. 673 F. Supp. at 544. Sections 251-252 give new entrants a legal right to use the incumbents' existing facilities to provide competing service. But until they are fully implemented (a process that is taking years), the provisions are merely words on a page. Indeed, according to the FCC, the BOCs in their regions continue to hold more than 97% of the local market. *See* Common Carrier Bureau, FCC Report on Local Competition (Dec. 5, 1998).

Consistent with the goal of increasing competition in all telecommunications markets, Congress authorized immediate BOC entry into important segments of the long-distance market previously fenced off by the MFJ. Section 271 unconditionally allowed the BOCs immediately to begin providing long distance service anywhere in the country outside their local monopoly regions. Within their regions, § 271(b)(3) enables the BOCs immediately to begin providing "incidental interLATA services" such as commercial mobile services (*e.g.*, cellular), without any of the restrictions previously imposed by the MFJ. *Compare* § 271(g)(3) *with United States v. Western Elec. Co.*, 890 F. Supp. at 7-11. Section 271 also gave the BOCs the right to provide long-distance services to connect to centralized gateways that provide information services, § 271(g)(4), and to provide long-distance signaling services, *compare* § 271(g)(5), (6).

Section 271 maintains the core of the MFJ's in-region long-distance restriction. But this provision also provides the BOCs with critical relief from the MFJ. It transfers authority over the long-distance restriction to the FCC (as the BOCs had long requested) and imposes a 90-day time deadline for deciding BOC applications. It authorizes BOC entry upon a showing that the basic requirements of §§ 251-252 have been "fully implemented" (§ 271(d)(3)(A)(i)), that some facilities-based competition exists (§ 271(c)(1)(A)), and that BOC entry is in the "public interest." § 271(d)(3)(C). The FCC has, moreover, determined that facilities-based competition exists when a new entrant leases BOC facilities pursuant to §§ 251-252.[7] Section 271 thus does not require the construction of actual competing networks. Indeed, a BOC can obtain in-region authority even when no form of competition has developed in a State, so long as the BOC has implemented the requirements of § 251(c) and the rest of § 271's competitive checklist, and satisfies § 271's other requirements. § 271(c)(1)(B). Section 271 also specifies that BOCs may obtain such authority on a state-by-state basis The test for BOC entry is thus substantially less demanding under § 271 than it was under the MFJ.

Sections 272-275 set forth other MFJ-related provisions. Section 272 requires the BOCs to provide long distance services through separate affiliates once they obtain in-region authority pursuant to § 271. Section 273 continues the MFJ's manufacturing restriction until a BOC satisfies the test for in-region long distance authority, but § 273(b) narrows that restriction by allowing the BOCs immediately to engage in "close collaboration" with manufacturers regarding design and

---

[7] *In re Application of Ameritech Michigan*, Memorandum Opinion and Order, 9 Communication Reg. (P&F) 267, ¶ 101 (1997).

development of equipment, to engage in "research activities related to manufacturing," and to enter into "royalty agreements" with manufacturers. Section 274 requires the BOCs to participate in the electronic publishing market (a subset of the information services market barred to them until the MFJ court removed the restriction) only through a separate affiliate until the provision sunsets in February 2000. It does not, however, "prohibit a separate affiliate . . . from engaging in the provision of electronic publishing." § 274(a). Section 275 restricts BOC entry into the alarm monitoring market (another subset of the information services market) until the provision sunsets in February 2001, but grandfathers in the only BOC that had entered that market.

Further, §§ 274 and 275 affect only the BOCs' ability to provide certain information services. Section 271(b)(4), however, grants the BOCs immediate relief that they said was essential for them to be able to enter the information services market by allowing them to provide long distance services to access centralized databases. *See Memorandum of the Bell Companies in Support of Their Motion for a Waiver of the Interexchange Restriction to Permit Them to Provide Information Services Across LATA Boundaries, United States v. Western Elec. Co.*, No. 82-0192 (D.D.C.) (filed June 25, 1993). Sections 274-275 impose restrictions on segments of the information services market where the loosening of that prohibition was thought to have special significance.

6. The BOCs enthusiastically supported enactment of this legislation. The Act's principal sponsor, Senator Pressler, noted that "[w]e now have the regional Bell Companies supporting the bill and we have the long distance companies supporting the bill. . . . That is an unusual, rare moment in American history." 142 Cong. Rec. S393 (daily ed. Jan. 26, 1996). After the Act's passage, SBC's Chairman lauded § 271

as "landmark legislation" that would allow SBC to "immediately provide long-distance service outside our . . . region and to our cellular customers everywhere,"[8] and that created "clear and reasonable pathways" for SBC to obtain authority to provide long distance service within its region -- "pathways that we're happy with."[9] The other BOCs were equally lavish in their praise.

7. Immediately after the 1996 Act became law, the BOCs took advantage of § 601(a) to move for formal termination of the MFJ in the district court. The district court vacated the MFJ in a brief order entered in April 1996. *United States v. Western Elec. Co.*, No. 82-0192 (HHG), 1996 WL 255904 (D.D.C. Apr. 11, 1996). The BOCs did not question the constitutionality of §§ 271-275 in that proceeding. Had any BOC done so, the MFJ court could not have terminated the MFJ without first determining whether §§ 271-275 are constitutional, and if not, whether they are severable from § 601(a) or the rest of the 1996 Act. A few months after the MFJ was vacated, SBC and other BOCs began applying pursuant to § 271 for authority to

---

[8]SBC Communications Inc., Investor Information, Statement of Edward Whitacre, Jr., Feb. 20, 1996; Chairman Edward Whitacre, Jr., Investor Briefing, Mar. 23, 1996.

[9]The Chairman of PacTel (now part of SBC) "lauded the signing of landmark telecommunications reform legislation . . . saying it, 'will unleash an extraordinary array of new services,'" and "congratulate[d] the Members of Congress and their staffs who made this bill happen." PacTel News Release, Feb. 8, 1996, at 1. NYNEX's chairman "applaud[ed] Congress for making history," and NYNEX's press release noted that the "bill sets the stage for real competition to develop in the local and long distance [markets] . . . by removing legal and regulatory barriers to [competition]." NYNEX News Release, Feb. 1, 1996. BellSouth's Chairman hailed the Act as inaugurating "a new era of competition in communications services," and noted the "bipartisan and industry-wide support for the [Act]." PR Newswire, Feb. 8, 1996.

provide in-region long distance service -- again raising no Attainder Clause challenge. The FCC denied the initial applications. It was not until 18 months after the Act's passage that SBC first attacked the long distance restriction as an attainder.

B. Proceedings Below.

1. SBC filed the instant action on July 2, 1997 in the District Court for the Northern District of Texas (Kendall, J.). On December 31, 1997, the court issued an opinion invalidating §§ 271-275. Acknowledging that §§ 271-275 would have been constitutional had they applied to all local exchange carriers, the court nevertheless concluded that the fact that they applied to a named subset of carriers automatically transformed them from valid economic regulations into punishment forbidden by the Attainder Clause. SBC Pet. App. 66a, 70a.

2. The Fifth Circuit reversed, holding that the provisions do not constitute "punishment" and thus cannot be bills of attainder. SBC Pet. App.12a-14a. The court reached this result on the basis of the "three necessary inquiries" prescribed by this Court: "(1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, 'viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes'; and (3) whether the legislative record 'evinces a congressional intent to punish.'" SBC Pet. App. 30a (quoting *Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841, 852 (1984)).

Examining the "type and severity of [the] burdens imposed," SBC Pet. App. 30a, the court held that §§ 271-275 "are not punishment because they serve a nonpunitive purpose:

attempting to ensure fair competition in the markets for local service, long distance, telecommunications equipment, and information services." SBC Pet. App. 32a. Recognizing that the challenged provisions "represent a hard-fought compromise on a massive issue of public policy which, in the end, contained both good and bad elements for the BOCs," the court concluded that "a legislative quid pro quo on this level simply cannot be punitive for attainder purposes." SBC Pet. App. 33a, 35a.

Judge Smith dissented. The gravamen of his dissent was that §§ 271-275 were analogous to barring specified individuals from pursuing a profession, and should for that reason automatically be deemed punishment.

REASONS TO DENY THE PETITIONS

The Petitions for Certiorari should be denied. There is no conflict among the Circuits respecting the constitutionality of §§ 271-275. The Fifth Circuit's decision is a correct application of settled Attainder Clause principles. The D.C. Circuit is in agreement with the Court of Appeals in this case that § 274 of the 1996 Act is not a bill of attainder. *See BellSouth Corp. v. FCC*, 144 F.3d 58 (D.C. Cir. 1998). In the unlikely event the D.C. Circuit departs from its prior analysis and holds § 271 unconstitutional in the case presently under submission, *BellSouth Corp. v. FCC*, No. 98-1019, this Court can grant review at that time. Unless such a conflict develops, review is not warranted.

The BOCs' principal plea for review depends on characterizations of §§ 271-275 that are baseless, and would require revolutionary change in settled law interpreting the Attainder Clause. To begin with, this case does not present the question whether the Attainder Clause forbids Congress from

"singl[ing] out 20 companies alone and by name for disabilities of a type this Court has repeatedly concluded constitutes punishment." *See* SBC Pet. (i). Congress did not single out the BOCs; the MFJ did. Congress thus legislated respecting a class the MFJ had already defined. Moreover, it strains credulity to describe §§ 271-275 as imposing "disabilities" that constitute "punishment." The challenged provisions made the BOCs undeniably better off by freeing them immediately from many of the MFJ's line of business restrictions, and by providing what they themselves call "clear and reasonable pathways" for removing the remainder -- pathways that are both substantively and procedurally more favorable to the BOCs than was the MFJ. In all events, even if §§ 271-275 were deemed "disabilities," they are not punishment. To the contrary, they are a legitimate and familiar form of economic regulation. The Fifth Circuit simply followed settled law in concluding that the provisions are not punitive in nature.[10]

I. THIS CASE DOES NOT PRESENT THE QUESTION IDENTIFIED IN SBC'S PETITION.

SBC's petition should be denied because this case does not even remotely present the question whether Congress may single out named corporations for punishment that takes the form of barring them from lines of business previously open to them.

1. Congress did not single out the BOCs for disfavored legislative treatment, much less render a legislative verdict that the BOCs and their management "hav[e] uncontrollable monopolistic tendencies." SBC Pet. 22. As Professor Tribe

---

[10]The alternative questions presented by Petitioner Bell Atlantic are meritless as well. *See* Point III *infra*.

testified to Congress in 1990, Congress could legislate specifically respecting the BOCs because they "have already been singled out" and made a distinct class by the MFJ. *See* page 9 *supra*. The MFJ had effectively established a national telecommunications policy framework because it applied to companies that controlled local service in 80% of the country and almost all major business centers. Any comprehensive overhaul of telecommunications regulation would naturally address the existence of those nationwide regulatory requirements, especially if Congress sought an approach that had the support of an industry consensus. Congress may single out by name a "legitimate class" for separate regulatory treatment, *Nixon v. Administrator of General Services*, 433 U.S. 425, 472 (1977), and that is all Congress did here.

2. For similar reasons, there is no basis to contend that §§ 271-275 reflect a congressional judgment that the BOCs are guilty of antitrust violations or are unusually likely to commit such violations in the future. The MFJ was a consent decree in a civil proceeding. It was premised not on a determination of the BOCs' guilt, but on a judgment that the mere integration of long distance facilities and concentrated local facilities inherently operates as a barrier to competition. Section 271 is no different. In all events, §§ 271-275 do not apply only to the BOCs, but to *any* firm that owns the monopoly local exchange facilities that the BOCs currently own. Section 271(a) (applicable to any "Bell operating company" or affiliate); *id.* § 153(4)(B) (defining "Bell operating company" as including "*any successor or assign of [a BOC] that provides wireline telephone exchange service*.") (emphasis added). Accordingly, if SBC were to sell its local exchange facilities to another firm, that entity would become subject to the restrictions in §§ 271-275. Because these restrictions apply to *any* owner of the particular facilities formerly governed by the MFJ, the BOCs'

contention that Congress singled them out for who they are or what they have done is wrong. Indeed, that contention is impossible to square with Congress' decision to free the BOCs to enter the large majority of the long distance market immediately.

3. The BOCs' argument that §§ 271-275 single them out for "disabilities" -- indeed, "historically forbidden punishments" SBC Pet. (i), 20 -- is pure distortion. The challenged provisions confer enormous benefits on the BOCs, which they lobbied for and praised at every juncture. Along with § 601(a)(1) of the 1996 Act (with which they are inseverably bound), the challenged provisions grant the BOCs long-sought relief. As a direct result of the Act, each BOC was immediately freed to compete for the vast majority of what the BOCs describe as the $70 billion long distance market. SBC Pet. 3. Moreover, if a BOC purchases local exchange facilities outside its region that are not covered by § 271, the BOC is free to use those facilities to provide long distance services in that region. *In re Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorization from Southern New England Telecommunications Corp., Transferor to SBC Communications, Inc., Transferee*, CC Docket No. 98-25, FCC 98-276, ¶ 36 (rel. Oct. 23, 1998). Section 271 likewise ameliorated the remaining MFJ long-distance and manufacturing restrictions by reducing the showing of local competition necessary to justify entry, and transferring administration of the restrictions to the FCC, which must operate under tight time deadlines.

4. For the above reasons, the Fifth Circuit's decision does not even remotely stand for the proposition that Congress may single out an individual company such as "Bank of America, Citibank, and NationsBank alone and by name" for restrictions on participating in investment banking. SBC Pet. 20. Even if

such a law would raise Bill of Attainder issues, no such law is at issue here. If Congress enacts such a law in the future (and there is no reason to think it will), the question posed by the BOCs can be considered then. It is neither necessary nor appropriate to do so now.

II. THE FIFTH CIRCUIT CORRECTLY APPLIED SETTLED ATTAINDER CLAUSE LAW IN HOLDING THAT SECTIONS 271-275 IMPOSED NO "PUNISHMENT" ON PETITIONERS.

Review would be unwarranted even if §§ 271-275 could properly be viewed as "disabilities" imposed for the first time on the BOCs. A line of business restriction is a familiar form of economic regulation that legislatures routinely impose for reasons having nothing to do with punishment. As Judge Williams observed, such laws are a "rather conventional response to commonly perceived risks of anticompetitive behavior." *BellSouth v. FCC*, 144 F.3d at 65. *See, e.g., Board of Governors of Fed. Reserve Sys. v. Agnew*, 329 U.S. 441 (1947) (discussing § 32 of the Banking Act of 1933 which prohibits members of firms that underwrite securities from serving as officers of National Banks); *FCC v. National Citizens Comm. for Broad.*, 436 U.S. 775 (1978) (upholding broadcast-newspaper cross-ownership ban). Such laws are obviously not punishment when applied to all participants in a market or profession. No court (other than the district court below) has ever held that such restrictions are transformed into punishment when applied to a specifically-defined group. Indeed, no court has ever held that superficially similar (but in fact quite different) legislation restricting individuals from pursuing professions or callings is automatically forbidden punishment when applied to named persons or a closed class. Courts have uniformly held that such restrictions may or may not be attainders, depending on whether they serve nonpunitive

regulatory purposes. The Fifth Circuit was thus on solid ground in conducting the "necessary" inquiry into whether §§ 271-275 serve such nonpunitive purposes. SBC Pet. App. 30a. Petitioners' claims that the Court of Appeals acted "[i]n the teeth of . . . precedent[]," "radically reinterpreted Attainder Clause jurisprudence," and "created" a new "exception" to the Clause (SBC Pet. 3, 4, 15), are specious.

1. It is well established that "laws that impose a duty or liability upon a single individual or firm are not on that account invalid," because "the Bill of Attainder Clause . . . requires not merely 'singling out' but also punishment." *Plaut v. Spendthrift Farms, Inc.*, 514 U.S. 211, 239 n.9 (1995). It is also well established that not every legislatively imposed disability constitutes "punishment." *Nixon*, 433 U.S. at 478 n.40 ("[O]ne who complains of being attainted must establish that the legislature's action constituted punishment and not merely the legitimate regulation of conduct"). Some disabilities -- such as execution, imprisonment, or banishment -- are inherently punitive in light of their "type and severity," and qualify as "punishment" for Attainder Clause purposes irrespective of whether they also serve prophylactic public purposes such as incapacitation or deterrence. Outside that narrow category, however, the Court has made clear "the need to examine the purposes served by a purported bill of attainder in determining whether it in fact represents a punitive law." *Id.* That is why the second of the three inquiries the Court described as "necessary" in *Selective Service System v. Minnesota Public Interest Research Group* requires evaluation of "whether the statute, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes." 468 U.S. 841, 852 (1984) (internal quotations omitted).

2. To try to create confusion where none exists, the BOCs contend that restrictions on the pursuit of a profession (and by analogy corporate line-of-business restrictions) fall within the narrow category of inherently punitive disabilities. They would treat such restrictions, in other words, as the corporate equivalent of a legislative death penalty imposed on an individual. For this proposition, they rely principally on *Nixon* -- a case rejecting an Attainder Clause challenge. To be sure, *Nixon* indicated that "a legislative enactment barring designated individuals or groups from participation in specified employments or vocations" might qualify as punishment (especially where "employed against those legislatively branded as disloyal"), 433 U.S. at 474, but *Nixon* did not suggest (much less hold) that such restrictions are automatically classified as punitive. To the contrary, the Court made clear that a "functional" analysis was necessary, and supported that assertion by citing the very case the BOCs here assert established an automatic rule of invalidation for restrictions on employment. *Id.* at 475-76 (citing *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 319-20 (1866)).

Cummings itself made clear that restrictions on individuals' pursuit of a profession "may" or may not be punitive, depending on "the circumstances attending and *the causes of* the deprivation." 71 U.S. (4 Wall.) at 320 (emphasis added). The Court's holding that the restrictions at issue were punitive resulted from a careful analysis of whether they were "appropriate as a condition of allowing the exercise of the profession," and concluding that there was "no connection" between the restriction imposed and any nonpunitive regulatory purpose. *Id. See also Hawker v. New York*, 170 U.S. 189, 198 (1898) (noting the *Cummings* Court's conclusion that "these oaths had no relation to the fitness or qualification of the two parties"); *Dent v. West Virginia*, 129 U.S. 114, 128 (1889) (same). Thus, far from establishing a rule of automatic

invalidation, the authority invoked by the BOCs unambiguously establishes that a restriction on the pursuit of a profession may or may not be punitive, depending on whether it can be justified on the basis of nonpunitive regulatory purposes.

This Court's precedents have always reflected that distinction. In *De Veau v. Braisted*, 363 U.S. 144 (1960), for example, the Court held that a restriction on the ability of convicted felons to hold office in any waterfront labor organization did not constitute punishment for Attainder Clause purposes. As *DeVeau* explained, the dispositive inquiry is "whether the legislative aim was to punish th[e] individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation." 363 U.S. at 160. *Accord Flemming v. Nestor*, 363 U.S. 603, 617 (1960) (restriction not punishment where "the source of [the] legislative concern can be thought to be the activity . . . from which the individual is barred, . . . even though it may bear harshly upon the one affected"). In contrast, the only employment bans held by this Court to be punitive for purposes of the Bill of Attainder clause have been bans imposed on suspected subversives or traitors. *See United States v. Brown*, 381 U.S. 437 (1965) (communists); *United States v. Lovett*, 328 U.S. 303 (1946) (same); *Pierce v. Carskadon*, 83 U.S. (16 Wall.) 234 (1872) (same); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1866) (members of the Confederacy); *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866) (same). In such situations, the decision to apply the restrictions to suspected traitors, and no others, severely undermined any effort to defend the restrictions on the ground that they aimed to regulate the calling rather than punish the person.

3. In the infrequent instances when Attainder Clause issues have arisen, the courts of appeals have applied these

settled principles in a straightforward manner that does not remotely suggest a need for guidance from this Court. *See, e.g., BellSouth Corp. v. FCC*, 144 F.3d 58, 65 (D.C. Cir. 1998); *McMullen v. United States*, 989 F.2d 603, 612 (2d Cir. 1993); *Brookpark Entertainment Inc. v. Taft*, 951 F.2d 710, 717 (6th Cir. 1991); *Dehainaut v. Pena*, 32 F.3d 1066, 1071 (7th Cir. 1994); *WMX Technologies, Inc. v. Gasconade County*, 105 F.3d 1195, 1202 (8th Cir. 1997); *Fresno Rifle and Pistol Club, Inc. v. Van de Kamp*, 965 F.2d 723, 727 (9th Cir. 1992). The D.C. Circuit, quoting Professor Tribe's treatise, expressly held that "'[e]ven measures historically associated with punishment -- such as permanent exclusion from an occupation -- have been otherwise regarded when the nonpunitive aims of an apparently prophylactic measure have seemed sufficiently clear and convincing.'" 144 F.3d at 65 (quoting Laurence H. Tribe, American Constitutional Law § 10-5, at 655 (2d ed. 1988)). Similarly, the Seventh Circuit has previously held that "[e]ven where a fixed identifiable group . . . is singled out and a burden traditionally associated with punishment -- such as permanent exclusion from an occupation -- is imposed, the enactment may pass scrutiny under bill of attainder analysis if it seeks to achieve legitimate and non-punitive ends and was not clearly the product of punitive intent." *Dehainaut v. Pena*, 32 F.3d at 1071. Thus, it is hardly surprising that both the Fifth Circuit in the case at bar and the D.C. Circuit in *BellSouth v. FCC* analyzed the constitutionality of § 274 in precisely the same manner, and reached the same result.

4. In sum, there can be no doubt that the Fifth Circuit was required to conduct a meaningful inquiry into whether §§ 271-275 truly constitute punishment of the BOCs. Petitioners deride the Fifth Circuit's analysis as creating an "imaginary 'prophylactic exception.'" But the Fifth Circuit's application of what it called the prophylactic exception was no more and no less than what *Selective Service* said was a "necessary" inquiry

into whether the provisions, "viewed in terms of the type and severity of the burdens imposed, reasonably can be said to further nonpunitive legislative purposes." 468 U.S. at 852 (internal quotations omitted). As the court noted, the phrase "prophylactic exception" was nothing more than a "moniker" for the test courts have always applied. SBC Pet. App. 19a n.20. The Fifth Circuit did not, however, hold (or even suggest) that self-evidently punitive disabilities such as execution, imprisonment or banishment could be saved from invalidation under the Bill of Attainder Clause merely by positing a prophylactic purpose for the punishment. To the contrary, the court conducted the inquiry to determine whether the provisions should be considered punishment to begin with, and concluded that they "*are not punishment* because they serve a nonpunitive purpose." SBC Pet. App. 32a (emphasis added). Thus, Petitioners' plea for review boils down to a disagreement with the label the Fifth Circuit chose for a well-settled principle of law.

5. It is Petitioners themselves who seek a radical reinterpretation of the Attainder Clause. The BOCs assert that the Clause "ensures that, where Congress seeks to impose a *disability*, it acts only by 'set[ting] forth a generally applicable rule' governing the conduct of all parties that possess particular traits, not by simply specifying individual parties that it believes should be subject to the *disability*." SBC Pet. 13-14 (emphasis added) (quoting *Brown*, 381 U.S. at 450). That, however, is emphatically not the law. *See Plaut v. Spendthrift Farms, Inc.*, 514 U.S. at 239 n.9. ("[L]aws that impose a duty or liability upon a single individual or firm are not on that account invalid -- or else we would not have the extensive jurisprudence that we do concerning the Bill of Attainder Clause, including cases which say that it requires not merely 'singling out' but also punishment.").

Nor are the BOCs correct that there should be a more stringent rule under the Bill of Attainder Clause for statutes that single out entities by name, rather than by defining a closed class encompassing identifiable entities. Those are, as the principal case on which the BOCs rely notes, "distinctions without a difference." *Brown*, 381 U.S. at 461. It is entirely permissible for Congress to legislate respecting specific named entities if the list of names is merely a shorthand for defining a class upon which Congress may legitimately impose a distinct regulatory regime. *See* Laurence H. Tribe, American Constitutional Law, § 10-4, at 646 (2d ed. 1988); *Brown*, 381 U.S. at 454 & n.29. Indeed, *Nixon* held that Congress may identify by name a "legitimate class of one." 433 U.S. at 372. So long as a reasonable nonpunitive explanation exists for treating the named entities differently from others, it does not matter whether the entities have been identified by name or on the basis of a characteristic applicable to a closed class. Just as the disabilities at issue in *Nixon* were not deemed automatically invalid merely because they applied to the former President by name, the disabilities at issue in *Brown* were not subject to more lenient review merely because they applied to a class defined by a common characteristic, rather than to specifically identified Communists.

III. THE FIFTH CIRCUIT'S DECISION DOES NOT PRESENT ANY SEPARATION OF POWERS OR EQUAL PROTECTION QUESTION WARRANTING REVIEW.

1. Bell Atlantic has not raised any separation of powers issue warranting review. Bell Atlantic admits, as it must, that if §§ 271-275 were applicable to all local exchange carriers, those provisions would raise no separation of powers concerns. BA Pet. 10. The claimed constitutional offense, therefore, is not that §§ 271-275 altered the law in a way that would modify

the prospective effect of the MFJ, but that they are "*party- and case-* specific." BA Pet. 18 (emphasis added). *Wheeling Bridge*, however, makes clear that Congress may change the law underlying ongoing equitable relief even if, as in that case itself, the statute specifically names the parties to and the subject of a particular injunction. 59 U.S. at 429; *see also Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992). *Wheeling Bridge* was not, as Bell Atlantic asserts, person-neutral. It involved a congressional enactment that identified by name "bridges across the Ohio River at Wheeling, in the State of Virginia, and at Bridgeport, in the State of Ohio, abutting on Zane's Island," and provided that "said bridges be declared to be and are established post-roads for the passage of the mails of the United States, and that *the Wheeling and Belmont Bridge Company* are authorized to have and maintain their bridges at their present site and elevation." 59 U.S. at 429 (internal quotes omitted) (emphasis added).

Nor can Bell Atlantic rescue its separation of powers argument by contending that *Wheeling Bridge* is no longer good law after *Plaut*. BA Pet. 23. That case explicitly stated that "nothing in our holding today calls [*Wheeling Bridge*] into question." *Id.* *Plaut* held only that Congress may not reopen final judgments, and noted that cases upholding legislation "that altered the prospective effect of injunctions entered by Article III courts . . . . distinguish themselves." 514 U.S. at 232. The distinction between legislation directing the reopening of final judgments (held unconstitutional in *Plaut*) and legislation altering the prospective effect of ongoing equitable relief (upheld in *Wheeling Bridge*) has been well understood by the Courts of Appeals.[11]

---

[11] *See Dougan v. Singletary*, 129 F.3d 1424, 1426 (11th Cir. 1997) (per curiam) ("As the Court explained in *Plaut v. Spendthrift Farm, Inc.*, a true 'final judgment' here means not an appealable judgment, but one that

2. Nor has Bell Atlantic raised any equal protection issue worthy of review. Sections 271-275 are economic regulations to which the rational basis test applies. *See FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). Congress' decision to treat the BOCs differently from other local carriers is plainly rational. Although GTE and the nation's remaining local telephone companies are also monopolies, they have operations that are geographically dispersed, serve overwhelmingly rural and suburban areas, or are far smaller. For these reasons, federal courts and the United States Department of Justice have long concluded that the BOCs should be treated differently from all other local carriers, based on the common sense perception that the BOCs' massive, concentrated monopoly facilities gave them an ability to discriminate and cross-subsidize not shared by other local carriers -- including GTE.[12]

---

represents the 'last word of the judicial department with regard to a particular case or controversy.' Consent decrees are final judgments, but not the 'last word of the judicial department.'"), *cert. denied*, 118 S. Ct. 2375 (1998) (footnotes omitted); *Inmates of Suffolk County Jail v. Rouse*, 129 F.3d 649, 657 (1st Cir. 1997) (same), *cert. denied*, 118 S. Ct. 2366 (1998); *Benjamin v. Jacobson*, 124 F.3d 162, 171 (2d Cir. 1997) (same); *Gavin v. Branstad*, 122 F.3d 1081, 1087 (8th Cir. 1997) (same); *Plyler v. Moore*, 100 F.3d 365, 371 (4th Cir. 1996) (same), *cert. denied*, 117 S. Ct. 2460 (1997).

[12]*See, e.g., Competitive Status of the Bell Operating Companies: Hearing on H.R. 3687 and H.R. 3800, Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 99th Cong. 86 (Mar. 13, 1986) (testimony of Douglas H. Ginsburg, Assistant Attorney General) ("The GTE telephone subscribers are not only many fewer in number than any of the RBOC's, but they are scattered geographically around the country."); *Telecommunications: The Role of the Department of Justice: Hearing Before the House Committee on the Judiciary*, 104th Cong. 66 (May 9, 1995) (testimony of Anne K. Bingaman, Assistant Attorney General) (relying on same distinction to explain "why the BOCs were subject to the line-of-business restrictions while GTE was allowed to offer long distance

In the face of this settled law, Bell Atlantic asks this Court to mint a new requirement of heightened scrutiny for economic regulations that allegedly fail a test of "person neutrality." But there is nothing presumptively suspect about person-specific laws. As this Court said in *Plaut*, "[w]hile legislatures usually act through laws of general applicability, that is by no means their only legitimate mode of action." *Plaut*, 514 U.S. at 239 n.9. That statement in *Plaut* follows inevitably from the Court's opinion in *City of New Orleans v. Dukes*, 427 U.S. 297 (1976), which applied rational basis scrutiny to an ordinance banning all but two specific pushcart vendors from New Orleans' French Quarter. Since *Dukes*, the Courts of Appeals have uniformly rejected a requirement of "person-neutrality" in cases involving person-specific statutes. *See, e.g., Maine Central Railroad Co. v. Brotherhood of Maintenance of Way Employees*, 813 F.2d 484, 488 (1st Cir. 1987); *Atonio v. Wards Cove Packing Co.*, 10 F.3d 1485, 1495 (9th Cir. 1993); *Central States, Southeast & Southwest Areas Pension Fund v. Lady Baltimore Foods, Inc.*, 960 F.2d 1339 (7th Cir. 1992); *Apache Bend Apartments Ltd. v. United States*, 964 F.2d 1556, 1564 (5th Cir. 1992), *superseded on standing grounds*, 987 F.2d 1174 (1993). This settled principle applies to laws that "disadvantage[] an individual or identifiable members of a group," as well as those that benefit a specific person. *Nixon*, 433 U.S. at 471 n.33. *Accord Maine Central Railroad Co.*,

---

services through a separate subsidiary"). *See also United States v. GTE Corp.*, 603 F. Supp. 730, 753 (D.D.C. 1984) (concluding that GTE "lacks the vast market domination . . . that would enable it to engage in anticompetitive practices irrespective of injunctions and separate affiliate provisions." *United States v. Western Elec. Co.*, 673 F. Supp. 525, 549 (D.D.C. 1987) (expressly rejecting the argument that the BOCs were indistinguishable from GTE and that the MFJ's line of business restrictions thus should be removed), *aff'd in part and rev'd in part on other grounds*, 900 F.2d 283 (D.C. Cir. 1990).

813 F.2d at 488; *Atonio v. Wards Cove Packing Co.*, 10 F.3d at 1495. It need not be revisited.

IV. PRACTICAL EXIGENCIES DO NOT WARRANT A GRANT OF CERTIORARI IN THIS CASE.

The practical arguments raised by the BOCs likewise provide no basis for granting review, and instead underscore the singular impropriety of invalidating §§ 271-275 on the basis of the constitutional arguments the BOCs have raised.[13] At the heart of the SBC Petition is a frank plea that this Court take national telecommunications policy into its own hands. The BOCs demand prompt review so that they might enter the long distance market in regions where they are still monopolies, asserting that such an outcome would produce "consumer gains." SBC Pet. 30; *see also id.* at 5.

Having waited 18 months after enactment of §§ 271-275 to challenge those provisions, the BOCs are hardly in a position to press this Court for immediate action. Moreover, in the unlikely event that this Court were to grant review and reverse the decision of the Fifth Circuit, the BOCs would *still* not obtain the relief they have sought in this litigation -- namely, the right to provide in-region long distance service. Such a result would depend on a further ruling that these provisions are severable from the remainder of the 1996 Act and in particular from § 601(a), which provided for termination of the MFJ. But §§ 271-275 are not severable. *See BellSouth*

---

[13]The *amicus* brief filed by the Attorneys General of eleven States provides no additional reason for granting review. That brief argues that if this Court is going to invalidate §§ 271-275, it should do so sooner rather than later to save the States the cost of various administrative proceedings. But that would be a reason to grant review only if the Fifth Circuit erred in upholding §§ 271-275 -- and it did not.

v. FCC, 144 F.3d at 66 n.8 ("Severability is largely a matter of legislative intent, and it is doubtful that Congress would have intended the many provisions of the Act beneficial to the BOCs to survive deletion of this burdensome one.") Indeed, the BOCs' own arguments preclude a finding of severability. If the BOCs are correct that Congress imposed §§ 271-275 because it wanted to punish the BOCs based on their supposed proclivities to violate the antitrust laws, then Congress could not possibly have intended to relieve the BOCs of the purportedly less stringent provisions of the MFJ in the event §§ 271-275 were invalidated. Thus, a ruling in the BOCs' favor on the question presented would do no more than restore the jurisdiction of a single district judge applying the standards and procedures of the MFJ.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted,

Thomas F. O'Neil III
William Single, IV
MCI WORLDCOM, INC.
1133 19th Street, N.W.
Washington, D.C. 20036
(202) 736-6096

Counsel for MCI WORLDCOM, Inc.

Donald B. Verrilli, Jr.*
Ian Heath Gershengorn
Michelle B. Goodman
JENNER & BLOCK
601 13th Street, N.W.
Washington, D.C. 20005
(202) 639-6000

**Counsel of Record*

David W. Carpenter
Peter D. Keisler
SIDLEY & AUSTIN
One First National Plaza
Chicago, IL 60603
(312) 853-7237

Counsel for AT&T Corp.

Mark C. Rosenblum
Marc E. Manly
Roy E. Hoffinger
AT&T CORP.
295 N. Maple Avenue
Basking Ridge, NJ 07920
(908) 221-3539

Counsel for AT&T Corp.

Charles C. Hunter
Catherine M. Hannan
HUNTER COMMUNICATIONS LAW GROUP, P.C.
1620 I Street, N.W., Suite 701
Washington, D.C. 20006
(202) 293-2500

Counsel for Telecommunications Resellers Association

Emily Williams
888 17th Street, N.W.
Suite 900
Washington, D.C. 20006
(202) 969-2587

Counsel for Association for Local Telecommunications Services

David P. Murray, Esq.
WILLKIE FARR & GALLAGHER
1155 21st Street, N.W., #600
Washington, D.C. 20036
(202) 328-8000

Counsel for Sprint Communications Company L.P.

Daniel L. Brenner
Neal M. Goldberg
David L. Nicoll
1724 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 775-3664

Counsel for National Cable Television Association

Danny E. Adams
Steven A. Augustino
KELLEY DRYE &
WARREN
1200 19th Street, N.W., #500
Washington, D.C. 20036
(202) 955-9600

Counsel for Competitive Telecommunications Association

Genevieve Morelli
Exec. Vice President/
General Counsel
COMPETITIVE TELE-
COMMUNICATIONS
ASSOCIATION
1900 M Street, N.W., #800
Washington, D.C. 20036
(202) 296-6650

Counsel for Competitive Telecommunications Association